

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRIUS GREENE,

Defendant-Appellant.

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UNPUBLISHED

May 15, 2012

No. 293513

Wayne Circuit Court

LC No. 09-007834-FH

Before: DONOFRIO, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted at a jury trial of carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of 1 ½ to 5 years imprisonment for the CCW and felon-in-possession convictions, and a consecutive term of two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his defense counsel was ineffective in two ways. First, he argues that his counsel was ineffective for failing to investigate, or call as a witness, Cheryl Jackson, defendant's friend of five years who was present during the events leading to defendant's arrest. Second, he argues that his counsel was ineffective for failing to investigate, or call as a witness, Detroit Police Officer Shannon Salisbury, one of the officers present during defendant's arrest. Defendant asserts that Officer Salisbury and Jackson would have testified, among other things, that they never saw defendant with a gun. Defendant argues that, had Jackson and Officer Salisbury testified, the outcome of the trial would have been different because the prosecution's evidence of defendant's guilt was otherwise weak. Defendant also argues that defense counsel's failure to call these witnesses was objectively unreasonable. We disagree.

Whether a defendant was denied the effective assistance of counsel "is a mixed question of fact and constitutional law." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). "A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *Id.* A trial court's findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.* at 484-485. "Clear error exists if [this Court] is left with a definite and firm conviction

that the trial court made a mistake.” *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

To justify reversal of a conviction on grounds of ineffective assistance of counsel, a defendant must show that his or her counsel’s performance was deficient and that such deficiencies prejudiced the defendant’s case. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). A defendant’s counsel is deficient if his or her performance falls “below an objective standard of reasonableness under prevailing professional norms.” *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). To establish prejudice, a defendant must show that a “reasonable probability” exists that, “but for counsel’s error, the outcome of the proceeding would have been different.” *Carbin*, 463 Mich at 600. “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (internal citations omitted).

“Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy. . . .” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008) (internal citations omitted). Defense counsel is afforded wide latitude on matters of trial strategy. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). To that end, this Court abstains from substituting its judgment for that of defense counsel on such matters. *Avant*, 235 Mich App at 508. “A particular strategy does not constitute ineffective assistance of counsel simply because it does not work.” *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

Defendant first contends that the trial court clearly erred in finding that he instructed defense counsel not to call or contact Jackson regarding his arrest. We disagree. At the *Ginther*<sup>1</sup> hearing, defendant and defense counsel provided contradictory testimony regarding this issue. Defendant testified that he requested defense counsel to contact two women, including Jackson, on at least six occasions. Defense counsel, by contrast, testified that on two occasions defendant specifically instructed defense counsel not to contact the women, even though defense counsel told defendant that the women’s testimony would be helpful to his defense. Defense counsel further testified that defendant provided no explanation for his instructions to not contact the women. Defense counsel’s case notes corroborate that on two occasions defendant instructed him not to contact the female witnesses. Ultimately, the trial court made a credibility decision in favor of defense counsel, and “regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appear before it.” MCR 2.613(C). Indeed, the weight of the evidence supports the trial court’s conclusion that defendant instructed his counsel to not contact Jackson or call her as a witness at trial. We are, accordingly, not “left with a definite and firm conviction that the trial court made a mistake” in making its conclusion. *Armstrong*, 490 Mich at 289.

Defendant has failed to show that defense counsel performed deficiently by following his instruction not to contact Jackson. Given that defendant’s and defense counsel’s trial strategy included defendant’s decision not to call Jackson, and that defense counsel informed defendant

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

that Jackson's testimony would be helpful, defense counsel was not ineffective for following his client's instruction. See *People v Dendel*, 481 Mich 114, 136-38; 748 NW2d 859, amended 481 Mich 1201 (2008) (CORRIGAN, J., concurring) (explaining that other jurisdictions have rejected the argument that defense counsel provided ineffective assistance where counsel followed his client's instructions). Ultimately, defendant cannot now predicate error on conduct by defense counsel that defendant requested. *People v Barclay*, 208 Mich App 670, 672-673; 528 NW2d 842 (1995).

Defendant urges this Court to find, despite defendant's instruction not to call the women, that defense counsel should have independently called Jackson to discuss defendant's arrest. In support of his argument, defendant relies on MRPC 1.2(a) and MRPC 1.4. Although this Court may look to the Michigan Rules of Professional Conduct (MRPC) for guidance on the objective standards of reasonable performance, *People v Johnson*, 451 Mich 115, 125; 545 NW2d 637 (1996), the commentary to both rules underscores that the client has the ultimate authority in deciding the purposes and objectives of his legal representation. For example, the commentary to MRPC 1.2 states that "[t]he client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." Similarly, the commentary to MRPC 1.4 states that "[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued to the extent the client is willing and able to do so." As explained, defendant instructed his counsel to not call Jackson. Accordingly, that defense counsel did not independently call Jackson in defiance of that instruction does not, without more, indicate that defense counsel's performance was objectively unreasonable.

Moreover, the failure to call a witness or present other evidence "only constitutes ineffective assistance of counsel when it deprives a defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant argues that Jackson's testimony would have supported his defense that he did not possess the handgun because she would testify that she did not observe him with a handgun that evening. However, the failure to present her testimony did not deprive defendant of that defense. During closing arguments, defense counsel highlighted that no one other than Officer Samuel Pionessa observed defendant with the silver object even though Officer Colon was present in the same scout car when the observation was made. Defense counsel also argued during his closing remarks that there were no fingerprints on the handgun, and that there was no video recording to substantiate Officer Pionessa's observations. Defendant also testified that he never possessed a handgun nor threw a handgun at the gas station. In other words, defendant was able to present his defense, even without Jackson's testimony. Accordingly, defendant was not deprived of a substantial defense, and it is unlikely that the outcome of trial would have been different had Jackson testified.

Contrary to defendant's assertions, Jackson's testimony could have been detrimental to his case. Jackson's testimony at the *Ginther* hearing revealed several inconsistencies between her testimony and defendant's testimony that would have undermined defendant's theory of the case, had Jackson testified at trial. Jackson testified at the *Ginther* hearing that two black vehicles pulled in to the gas station, one behind their car, and that police sirens were not activated at that time. Jackson testified that she did not realize that the two vehicles were police cars until later in the evening when a third marked police vehicle arrived at the gas station. By

contrast, defendant testified at trial that one vehicle pulled up seconds after the car parked. According to defendant, at first, he did not realize that it was a police vehicle, but after the sirens were activated, defendant realized that the scout car was a police car and then intentionally fled the scene because he feared arrest for having previously violating his probation. Jackson's testimony would have undermined defendant's theory that he ran because he knew that the car was a police vehicle, and that he fled in fear of being arrested, not because he dropped the handgun.

Defendant also failed to establish that defense counsel provided ineffective assistance of counsel by not calling Officer Salisbury. At the *Ginther* hearing, Officer Salisbury testified that Officer Pionessa informed her that he saw defendant throw an object appearing to be a handgun. Officer Salisbury testified that she did not personally observe defendant throwing the object. Although Officer Salisbury's testimony ostensibly supports defendant's theory that he never possessed the gun, Officer Salisbury also observed defendant walk near the front of the gas station and then walk to his car and open the door. This corroborated the other officers' testimony that defendant was walking near the gas station and contradicted defendant's testimony that he did not exit the car until the police sirens were activated. Therefore, defendant failed to establish that the decision to refrain from calling Officer Salisbury was not sound trial strategy.

In short, defendant has failed to show that defense counsel's representation fell below an objective standard of reasonableness. Defendant has also failed to establish prejudice, given that neither the testimony of Jackson or Officer Salisbury would have been outcome determinative. Accordingly, defendant's ineffective assistance of counsel claim fails.

## II. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecution's failure to provide Officer Salisbury's police report deprived him of his right to due process. We disagree.

"Generally, a claim of prosecutorial misconduct is a constitutional issue that is reviewed de novo, but a trial court's factual findings are reviewed for clear error." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). In reviewing for prosecutorial misconduct, this Court must determine "whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Where there is no allegation that prosecutorial misconduct violated a specific constitutional right, a court must determine whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process of law." *People v Blackmon*, 280 Mich App 253, 262; 761 NW2d 172 (2008).

"Due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure." *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). To establish a *Brady*<sup>2</sup> violation, a defendant must prove that the state possessed and suppressed favorable evidence and "that had

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<sup>2</sup> *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.” *People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW2d 384 (1998).<sup>3</sup> “A reasonable probability of a different result exists where suppression of the evidence undermines confidence in the outcome of the trial.” *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998).

As discussed above, Officer Salisbury’s testimony, which mirrored her report, supported defendant’s theory that he did not possess the weapon, but also contradicted other portions of defendant’s testimony. “In determining the materiality of undisclosed information, a reviewing court may consider any adverse effect that the prosecutor’s failure to respond might have had on the preparation or presentation of the defendant’s case.” *Fox*, 232 Mich App at 549. Since the investigator’s report indicated that Officer Pionessa informed the other officers of his observations, which implied that the other officers did not make the same observation, defense counsel had all of the information needed to decide to call Officer Salisbury, without needing access to her report. In other words, we need not decide whether the prosecution withheld Officer Salisbury’s report because defendant’s access to that report would not have been outcome-determinative. Accordingly, defendant failed to establish a *Brady* violation.

Affirmed.

/s/ Pat M. Donofrio  
/s/ Kathleen Jansen  
/s/ Douglas B. Shapiro

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<sup>3</sup> A defendant must also prove that he did not possess the evidence or could not have obtained the evidence by exercising reasonable diligence. *Fox*, 232 Mich App at 549. Although the trial court did not make a finding regarding whether the prosecution withheld the report, we restrict our analysis the materiality of the report.